TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~235~~ 105.

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED AUGUST 26, 1905.

(19,888.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 29, 1905.

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1 North Carolina Supreme Court.

STATE OF NORTH CAROLINA
vs.
ERNEST GATEWOOD.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of North Carolina, before you, or some of you, being the highest court of law or equity of said State, in which a decision could be had in said suit between the State of North Carolina and Ernest Gatewood, in which the said Ernest Gatewood was appellant, wherein was drawn in question the validity of a statute, or an authority exercised under, of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege and exemptions specially set up or claimed under such clause of the said Constitution, all of which appears in the record and proceedings in said suit, manifest error has happened, to the great damage of the said Ernest Gatewood, as by his complant and contentions appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things therein concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date of this
2 writ in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of August in the year of our Lord 1905.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk of the Circuit Court of the United States
for the Eastern District of North Carolina,
By GEO. L. TONNOFFSKI, D. C.

Allowed.
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 UNITED STATES OF AMERICA, *ss*:

To the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C. on the 2nd Monday, the 9th day of October, next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of North Carolina, wherein The State of North Carolina is plaintiff and Ernest Gatewood is defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter Clark, chief justice of the supreme court of North Carolina, this the 14th day of August in the year of our Lord 1905.

WALTER CLARK,
Chief Justice.

Service of the above citation and receipt of a copy thereof admitted this the 15th day of August 1905.

A. L. BROOKS,
Attorney for State of North Carolina.

4 UNITED STATES OF AMERICA:

In the Supreme Court.

STATE OF NORTH CAROLINA
vs.
ERNEST GATEWOOD.

And now on this the 14th day of August, 1905, comes the defendant, Ernest Gatewood, plaintiff in error, by his attorneys Robert W. Winston and Victor S. Bryant, and say- that in the record and proceedings in the above entitled criminal cause, upon the special verdict found by the jury under the provisions of the Code of North Carolina, there is error in that:—

First. The said supreme court of North Carolina erred in deciding and holding in the opinion handed down and in the judgment rendered by said court in this cause, that there is "no error" in any of the several rulings, holdings and judgment of the superior court of Person county, North Carolina, upon the special verdict found by the jury and upon the judgment of the superior court of said Person county set forth in this cause thereby fully sustaining and affirming in each and every particular the said rulings, holdings and judgment of said superior court of Person county, and the plaintiff in error assigns the same as error contending now, as heretofore, that

the aforesaid rulings, holdings and judgment of the said superior court of said Person county should have been wholly reversed by said supreme court of North Carolina.

Second. And for a more particular and specific assignment of errors, the plaintiff in error says there was error in the following particulars, and in each of the following rulings and holdings of the court upon the said special verdict and judgment pronounced therein set forth in the record.

(1.) "Such condemned business has no connection with,
5 and the constitutionality of the prohibitive act is in no wise effected by the provision in section 7, that when any person, firm, or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell the necessary commodities required in the ordinary course of their business, it shall not be deemed a violation of this act,—the act forbidding the business of carrying on a bucket shop."

(2.) "Though section 7, mentions only manufacturers and wholesale mercantile establishments as authorized to make *bona fide* dealings in futures, this was done unnecessarily we think, and only out of abundant caution; it is not a discrimination, for there is no prohibition upon anyone else, or any other business to buy commodities for future delivery *bona fide* in the ordinary course of such business when not for speculative or gambling purposes; that no other business or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on margin is not an implied restriction upon others to do an act not forbidden by any statute."

(3.) "Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants, it does not authorize them to engage in any business prohibited by the act of 1889, it does not authorize them to speculate in cotton or other commodities; it simply provides that the courts shall not construe the act of 1905, to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

(4.) The defendant further contends that by section 5, c. 538 Laws 1905, proof that nothing was actually delivered at the date of the contract, and that a "margin" was put up, shall be *prima facie* evidence that the contract is a wagering one, and forbidden by chapter 221, p. 233, Laws 1889, and that section 7, c. 538, Laws 1905,
provided that this last act shall not apply to purchases or
6 sales by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the fourteenth amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence is necessarily a matter left to legislative discretion in the exercise of the police power.

(5.) There may be good reasons why the purchase of necessary commodities required in the ordinary course of their business for

future delivery on a margin by manufacturers and wholesale merchants shall not raise a presumption that such dealings are wagering contracts, while purchases by them, not of such commodities, or when not required in the ordinary course of their business, or the purchase by others of any commodities, when made on the deposit of a margin and for future delivery, shall raise the presumption of a wagering contract. Whether the reason is good and sound for making the purchase of commodities upon margin *prima facie* evidence of a wagering contract under a certain state of facts, and providing that upon a different state of facts such purchase upon margin does not constitute *prima facie* evidence of a wagering contract, is a matter for the legislature. The courts have no veto power upon such exercise of the police power. State *v.* Barrett (at this term), (50 S. E. 506).

(6.) The facts found are that the defendant was carrying on the forbidden business. It can in *now* wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon margin shall, under certain circumstances, raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence as to certain purchases upon margin, were null because not applying to all purchases upon margin, this would in no wise invalidate that part of the statute which forbids carrying on the business of running a bucket shop. The defendant is
7 not indicted for buying commodities for future delivery upon a margin; nor are manufacturers and wholesale merchants, nor anyone else, exempted from the prohibition of carrying on the bucket shop business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

(7.) So far the provisions of both acts clearly fall within the police power of the State, and it is not denied that, if nothing further appeared in the statute, the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the business forbidden by the above-cited statu-es, Laws 1889, p. 233, c. 221, and Laws 1905, c. 538.

8 Third. And the judgment set forth in this record based upon and rendered by the court pursuant to the special verdict of the said superior court of Person county, which was upon exceptions thereto and by appeal therefrom sustained by said supreme court of North Carolina was also erroneous.

Fourth. The supreme court of North Carolina in the opinion handed down in this cause erred in deciding and holding that upon the special verdict the defendant was properly adjusted guilty, thereby in effect erroneously deciding and holding that chapter 538, Law of 1905, was not in conflict with section 1 of the 14th amendment of the Constitution of the United States, to wit; the section

which guarantees equal protection of the laws and due process of law to all persons.

Wherefore the said plaintiff in error prays that the judgment of the supreme court of North Carolina be reversed and that such orders and decrees be made and further proceedings had as the plaintiff in error may be entitled to.

Dated at Raleigh, N. C., Aug., 1905.

ROBERT W. WINSTON,
VICTOR J. BRYANT,
Attorneys for Ernest Gatewood, Plaintiff in Error.

9 Bond.

Know all men by these presents that we, Ernest Gatewood principal, and T. J. Lambe and C. L. Lindsay, as sureties, are held and firmly bound to the State of North Carolina in the full and just sum of five hundred dollars to be paid to the said State of North Carolina and its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated the 14th. day of August in the year of our Lord 1905.

Whereas lately in the supreme court of North Carolina, in suit pending in said court between The State of North Carolina plaintiff and Ernest Gatewood defendant, judgment was rendered against the said Gatewood, and said Ernest Gatewood having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the State of North Carolina, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 9th. day of October next: Now, the condition of the above obligation is such that if the said Ernest Gatewood shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make his said plea good, then the said obligation to be void; otherwise to remain in full force and effect.

ERNEST GATEWOOD,
By ROB'T W. WINSTON AND
VICTOR S. BRYANT,
His Attorneys.
C. L. LINDSAY. [SEAL.]
T. J. LAMBE. [SEAL.]

STATE OF NORTH CAROLINA, }
County of Durham. }

C. L. Lindsay being duly sworn says he is a freeholder and resident of the county of Durham aforesaid, and that he is worth the sum of one thousand dollars over and above all his just debts and

liabilities, and in excess of his homestead and personal property exemptions allowed by law.

C. L. LINDSAY.

Subscribed and sworn to before me this 22 August, 1905.
[L. S.] W. J. CALLOWAY,
Notary Public.

STATE OF NORTH CAROLINA, }
County of Durham. }

T. J. Lambe, being duly sworn, says he is a freeholder and resident of the county of Durham aforesaid, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities, and in excess of his homestead and personal property exemptions allowed by law.

T. J. LAMBE.

Subscribed and sworn to before me this 22 August, 1905.
[L. S.] W. J. CALLOWAY,
Notary Public.

Approved:
WALTER CLARK,
Chief Justice of Supreme Court of N. C.

10 NORTH CAROLINA, }
Person County. }

Be it remembered that at a superior court of law held for the county of Person at the court-house in Roxboro on the fifth Monday after the first Monday in March in the year of our Lord one thousand nine hundred and five, before the Honorable R. B. Peebles, judge presiding, upon the oath of G. B. Williams, S. S. Moore, J. R. Long, G. W. Dunny, Walter Williams, G. W. Moore, C. B. Brooks, G. T. Pentecost, G. A. Daune, W. A. Barton, Zeb V. Barnett, J. W. Clayton, A. P. Brooks, Zadock Slaughter, M. .T Carver, J. T. Newton, C. G. Reade and R. C. Hester, good and lawful men of the county aforesaid, duly summoned, drawn, sworn and charged to inquire for the State, of and concerning all crimes and offenses committed within said county, and it is presented in manner and form following, that is to say:

Indictment.

NORTH CAROLINA, }
Person County. }

The jurors for the State upon their oaths present: That Ernest Gatewood, late of the county of Person, on the 1st day of April, 1905, with force and arms at and in the county aforesaid unlawfully and willfully did establish and open and keep then and there an

office and place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton and other products, also stocks, bonds and other evidences of debt to other persons or corporations for future delivery at some other time and place, and that he, the said Ernest Gatewood was then and there ready, willing and prepared, and did intend to unlawfully and willfully enter into such contracts with all persons and corporations to sell and deliver cotton and other products, and also stocks, bonds and other evidences of debt to other corporations for future delivery at some other time and place where it was not intended by the parties hereto that the articles so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that money or other things of value should be paid to one party by the other or to a third party, and that the amount of such money or other thing of value so to be paid, to depend upon whatever the market price or value of the article so agreed to be sold and delivered was greater or less at the time and place so specified than the price so stipulated to be paid and received for the article so to be sold and delivered, such contracts commonly called future contracts, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

And the jurors aforesaid upon their oaths aforesaid do further present that the said Ernest Gatewood, late of said county, on the 1st day of April, 1905, with force and arms and in the county aforesaid unlawfully and willfully did post and publish from information received over his wires the fluctuations in price of grain, cotton, provisions, stocks, bonds and other commodities contrary to the form of statute in such cases made and provided. And the jurors upon their oaths do further present that the said Ernest Gatewood, late of said county, on the 1st day of April, 1905, with force and arms at and in said county aforesaid unlawfully and willfully did take and receive from E. T. Lea an order or contract to purchase on margin 100 bales of cotton for future delivery, to-wit, August delivery at 7 56-100 — per pound and that said Lea did deposit with said defendant at said time in said county, the sum of $50.00 by way of
11 margin fluctuations in said cotton, and that settlement between said parties for said cotton was agreed to be made upon the difference in value of said cotton at said date and the date of its delivery, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

BROOKS, Solicitor.

Endorsements.

Endorsements on bill.
State against Ernest Gatewood.
Indictment.
Keeping office to sell margins.

Witness:
C. T. WILSON. X

Those marked X sworn and examined and this bill found true bill.

G. B. WILL-AMS,
Foreman Grand Jury.

Jury.

Whereupon the sheriff of said county is commanded that he cause the said Ernest Gatewood to come and answer at the said term of said court, and afterwards to-wit, at the term of said court held in Roxboro on the fifth Monday after the first Monday in March in the year of our Lord one thousand nine hundred and five, it being the 10th day of April, 1905, before the Honorable R. B. Peebles, judge presiding, cometh the said Ernest Gatewood in his own proper person, and having heard the said indictment read, he saith that he is not guilty thereof, and of this he puts himself upon the country, and A. L. Brooks, solicitor, who prosecutes for the State in this behalf, doth the like. Therefore, let a jury come of good and lawful men, by whom the truth of the matter may be known. And thereupon the following jurors, to-wit: S. Y. Wrenn, L. B. Clayton, R. A. Allen, J. H. Sherman, J. D. Ashley, Wesley Laus, Henry Mitchell, A. M. Denny, F. D. Daniel, G. C. Fousher, J. H. Pentacost, W. S. Dixon, being chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment specified, upon their oath they say as follows:

Special Verdict.

In this case the jury come into open court and return the following special verdict, to-wit:

1. The defendant is operating in Roxboro, N. C., an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton, corn, stocks, bonds and choses in action to other persons for future delivery at some other time and place, and is ready, prepared and intends to enter into contracts with any and all persons to sell and deliver cotton, corn, stocks and bonds and other choses in action for future delivery at some other time and place, and that it was not intended by the parties to said contracts that the said articles or things so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that money should be paid to the one party by the other, and that the amount of such money or thing of value so to be paid was to depend upon whether the market price or value of the article so agreed to be sold and delivered was greater or less at the time and place so specified than the price so stipulated to be paid and received for the articles so to be sold and delivered and that such a contract is what is called a future contract.

2. That on the 10th day of April, 1905, the defendant received

from E. T. Lea an order to purchase on margin 100 bales of cotton for future delivery, to-wit, for August delivery at 7 56-100 cents —. That said Lea deposited with the defendant at said time in said county the sum of $50.00 by way of margin to cover fluctuations in the price of said cotton. That settlement between said parties was agreed to be made upon the difference in value of said cotton at said date and the date of delivery.

12 3. That in said office at Roxboro the defendant has posted and published from information received on the 10th day of April over his wires the fluctuations in prices of grain, provisions, cotton, bonds and other commodities.

If upon the foregoing facts the court is of opinion that the defendant is guilty the jury so find. If the court is of opinion upon the facts so found that he is not guilty then the jury find him not guilty.

The court being of opinion upon the facts as found that the defendant is guilty orders a verdict of guilty to be entered and upon motion orders that the defendant pay a fine of five dollars and costs.

Exceptions and Judgment.

Thereupon the defendant moved for a new trial because the act of 1905, chapter —, is in conflict with XIV amendment, section 1, of the Constitution of the United States, to-wit: The guarantee of equal protection of the laws. Motion overruled, and it is thereupon considered by the court that the said Ernest Gatewood shall pay a fine of $5.00, and that he stand committed to the custody of the sheriff until the said fine and cost of this prosecution be paid.

From this judgment the said Ernest Gatewood prays an appeal to the supreme court, and it is allowed upon his giving bond in the sum of $50.00 with G. C. Farthing as surety. Appeal bond given and herewith sent.

Case on Appeal.

This was a criminal action tried before his honor, R. B. Peebles, judge, and a jury at the April term, 1905, of Person county superior court. Upon the hearing and evidence offered the jury returned a special verdict as set out in the record. Upon said verdict his honor was of the opinion that the defendant was guilty and the jury thereupon rendered a verdict of guilty. The defendant moved for a new trial for error as set out in the record, motion overruled and defendant excepted and appealed to the supreme court. Notice of appeal given in open court, notice waived. Judgment rendered as set out in the record.

GUTHRIE & GUTHRIE,
WINSTON & BRYANT,
Attorneys for Defendant.

Service is accepted of the foregoing case on appeal, and the same is accepted by the solicitor as the case on appeal for the supreme court.

A. L. BROOKS,
Solicitor Ninth Judical District.

Undertaking on Appeal.

NORTH CAROLINA,
Person County.

STATE
against
ERNEST GATEWOOD.

Whereas, Ernest Gatewood above named has appealed from the judgment of the superior court of Person county at this term entering fine of five dollars and costs against him for dealing in futures.

Now, therefore, Ernest Gatewood and G. C. Farthing undertake in the sum of fifty dollars, that we will pay all cost which may be awarded against him by the supreme court upon said appeal, and the said Ernest Gatewood and G. C. Farthing bind themselves, their heirs and executors to and with the State of North Carolina that they will pay whatever costs may be taxed against the defendant upon said appeal.

Witness their hands and seals this April 12, 1905.

ERNEST GATEWOOD. [SEAL.]
G. C. FARTHING. [SEAL.]

13 NORTH CAROLINA,
Person County.

G. C. Farthing, being duly sworn states that he is worth one hundred dollars over and above his debts, liabilities and exemptions. This April 12, 1905.

Sworn to and subscribed before me this April 13, 1905.

W. J. HOLLOWAY,
Notary Public.

Clerk's Certificate.

I, D. W. Bradsher, clerk of the superior court of law of the county of Person, do hereby certify that the foregoing contains a full, true and perfect transcript of the record of said Court in the case of the State against Ernest Gatewood.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at office in Roxboro, this the 11th day of April, 1905.

D. W. BRADSHER,
Clerk Superior Court.

[L. S.]

Docketed Apr. 13, 1905. Argued Apr. 26, by attorney general for State, Winston & Bryant and Guthrie & Guthrie for defendant. Opinion handed down on May 23, 1905, as follows:—

Per Curiam: Upon the authority of State *v.* McGinnis, at this term, there is no error.

14 (Title of Cause:)—Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Person county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court be certified to the said superior court, to the intent that proceedings be had therein in said cause according to law.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of twenty-one 80/100 dollars ($21.80), and execution issue therefor.

15 The record and proceedings in State *v.* McGinnis, referred to in the above transcript of record are as follows:—

NORTH CAROLINA, }
Wake County. }

Superior Court, March Term, 1905, Before Walter H. Neal, Judge.

(Formal Opening of Court and Name of Grand Jury.)

Indictment.

The jurors for the State upon their oath present:

That E. C. McGinnis, late of the county of Wake, on the 22nd day of March, in the year of our Lord, one thousand nine hundred and five, with force and arms, at and in county aforesaid, unlawfully and wilfully, did establish, open and have, then and there, an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton, Indian corn, wheat, rye, oats, tobacco, salt, pork, salt fish, meal, lard, bacon, beef cattle, sugar, coffee, stocks, bonds, and choses in action, to other persons or corporations, for future delivery, at some other time or place, and that he, the said E. C. McGinnis, then and there, was ready, willing, and prepared and intended to unlawfully and wilfully enter into such contracts with all persons and corporations to sell and deliver cotton, Indian corn, wheat, rye, oats, tobacco, salt, pork, salt fish, meal, lard, bacon, beef cattte, sugar, coffee, stocks, bonds, and choses in action, to other persons and corporations, for future delivery, at some other time and place, whereas

it was not intended by the parties thereto that the articles or things, so agreed to be sold and delivered should be actually delivered, or the value thereof paid, but it was intended and understood by them that money or other things of value should be paid to one party by the other, or to a third party, and that the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered, was greater or less, at the time and place so specified, than the price stipulated to be paid and received for the articles so to be sold and delivered, said contracts being commonly called "futures," against the form of the statute in such case made and provide, and against the peace and dignity of the State.

ARMISTEAD JONES, Solicitor.

16 (Title of Cause.) [Endorsed.]

Witnesses: R. G. Reid, J. A. Pope.*

Those marked * sworn by the undersigned foreman, and examined before the grand jury and this bill found a true bill.

J. D. MARCOM,
Foreman Grand Jury.

Trial, Etc.

And thereupon at said March term, A. D. 1905, begun and held as aforesaid, at the court-house in Raleigh, on the third Monday after the first Monday in March, in the year of our Lord, one thousand nine hundred and five, before Honorable Walter H. Neal, judge, cometh the said E. C. McGinnis, in his proper person, and having heard the said indictment read, he saith that he is not guilty thereof, and of this he puts himself upon the country, and Armistead Jones, Esq., solicitor, who prosecutes for the State in this behalf, doth the like.

Therefore let a jury come of good and lawful men, by whom the truth of the matter may be better known.

And thereupon the following jurors, to-wit: A. J. Sorrell, P. A. Sorrell, J. M. Norwood, J. G. Upchurch, R. J. Barham, W. J. Mitchell, W. H. Wall, S. C. Seagroves, O. W. Lynn, W. J. Wilson, E. D. McNeal and J. D. Johnson, being chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment specified upon their oath say:—

Special Verdict.

The jury find the following as a special verdict:

That E. C. McGinnis of Wake county, on the 22nd day of March, 1905, established, opened and had, in the city of Raleigh, N. C., an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver

cotton, Indian corn, wheat, rye, tobacco, salt, pork, salt fish, meal, lard, bacon, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, to other persons or corporations for future delivery, at some other time and place, and that he, the said E. C. McGinnis, then and there, was ready, willing and prepared and intended to enter into said contracts with any persons and corporations to sell and deliver cotton, Indian corn, wheat, rye, tobacco, salt, pork, salt fish, meal, lard, bacon, beef, cattle, sugar, coffee, stocks, bonds and choses in action, to other persons and corporations for future delivery at some other time and place, whereas, it was not intended by the parties thereto that the articles or things so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that the money or other things of value should be paid to the one party by the other, or to a third party, and that the amount of such money or other things of value so to be paid to depend upon whether the price or value of the market price or value of the articles so agreed to be sold and delivered was greater or less, at the time and place so specified, than the price stipulated to be paid and received for the articles so to be sold and delivered. Said contracts being commonly called "futures."

If upon the foregoing facts the court shall be of opinion that the defendant is guilty, then the jury find him guilty. If upon the foregoing facts the court shall be of opinion that the defendant is not guilty, then the jury find him not guilty.

The court thereupon instructed the jury that upon the facts found, the defendant was guilty, and the jury returned a verdict of guilty.

17 Judgment.

And thereupon the judgment of the court being prayed by the solicitor for the State, it is considered and adjudged by the court that the said E. C. McGinnis, now here, shall pay a fine of five dollars and the costs herein to be taxed by the clerk of this court.

(Defendant appealed to supreme court, and filed bond on appeal.)

Admissions of the Defendant Before the Justice of the Peace Referred to and Ordered to Constitute a Part of the Case on Appeal to Supreme Court.

It is admitted by the defendant that he is an agent in Raleigh of Ware & Leland, who are members of the New York cotton exchange, and have an office in the city of New York; that the defendant as such agent now maintains an office heretofore established in the city of Raleigh, where are posted and published, from information received, fluctuating prices of cotton, grain, stocks, bonds and other commodities, as reported from time to time from said New York cotton exchange and other sources.

E. C. McGINNIS, Defendant.

Exceptions.

The defendant excepts to the judgment rendered in the above entitled case and assigns for error:

1. That the court held that the act of the General Assembly of North Carolina enacted at its session of 1905, entitled "An act to prevent dealing in futures," under which the defendant is indicted, was valid and constitutional and directed the jury to return a verdict of guilty upon the special verdict; whereas the court should have held that said act was invalid and unconstitutional, because it is in conflict with the provisions of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and should have directed a verdict of not guilty.

2. Because the said court held that said act was not in conflict with article 1, section 8, of the Constitution of the United States and was therefore valid and directed the jury to return a verdict of guilty upon the special verdict; whereas said court should have held that said act was in conflict with said section and was therefore invalid and should have directed a verdict of not guilty.

3. Because the said court held that said act was not in conflict with article 1, section 7, of the Constitution of North Carolina and was therefore valid, and directed the jury to return a verdict of guilty upon the special verdict; whereas said court should have held that said act was in conflict with said section 7 of article 1 of the constitution of North Carolina and was therefore invalid, and should have directed the jury to return a verdict of not guilty.

(Certificate and seal of the clerk superior court of Wake county.)

Docketed Apr. 7, 1905; argued Apr. 26; opinion handed down May 23 as follows:

18 CLARK, C. J.:

This is an indictment under chapter 538, Laws 1905, "to prevent dealing in futures."

By chapter 221, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," it was in substance enacted as follows: Section one made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section two enacted that when the defense provided by that act is set up in a verified answer, the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section three

made the parties to such contract, and agents concerned therein, indictable, and section four made persons while in this State consenting to become parties to such contract, made in another State, and all agents in this State, aiding and furthering such contract, made in another State, indictable.

Chapter 538, Laws 1905, provides: Section 1. That it shall be unlawful to open or establish an office in this State for dealing in futures, as forbidden by aforesaid act. Section 2 makes such act a misdemeanor. Section 3 provides that no person participating in such act shall be excused from testifying, but a party so testifying is pardoned for such offense. Section 4 specifies certain acts which shall be *prima facie* evidence of a violation of this statute. Section 5 specifies what shall be *prima facie* evidence of a contract forbidden by the act of 1889, and section 6 provides what shall be *prima facie* proof of the opening and establishing an office in violation of this act and the act of 1889.

So far, the provisions of both acts clearly fall within the police power of the State, and it is not denied that if nothing further appeared in the statute, the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the business forbidden by the above cited statutes, Laws 1889, ch. 221, and Laws 1905, ch. 538.

The business forbidden by the act of 1905 is—to avoid a *paraphrasis*, and following the usual American method of describing an act by a word or a phrase—the business of running a "bucket shop," which is defined by the Century Dictionary as, "An establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in." In Board of Trade of Chicago *v.* Odell Commission Co., 115 Fed. Rep., 574, the president of the board of trade, in answer to a question, thus defined a "bucket shop:" "It is a place where dealings are had upon the fluctuations in the market price, without any *bona fide* transactions."

The definition of "bucket shop" in Webster's Dictionary is,
19 "An office or place where facilities are given for betting small sums on current prices of stocks, petroleum, etc."

In Smith *v.* Tel. Co., 84 Ky., 664, the court describes the manner of dealing at a "bucket shop" in full detail, and defines its business, "while purporting to be actual transactions" as being "*in fact merely wagers* on the market price of some commodity, at some specified time in the future," and in the absence there of any statute, held that such business was "a species of gambling as well defined and reprehensible as that of keeping a faro bank or a dice machine, and it is therefore illegal and contrary to public policy." A "bucket shop" is defined (Bryant *v.* Tel. Co., 17 Fed. Rep., 825, and Fortenbury *v.* State, 47 Ark., 192), as "a place where wagers are made

upon the fluctuations in the price of grain and other commodities," and in both cases the course of dealings at such establishment is fully described, as in Smith *v.* Tel. Co., *supra*, but in all these cases, of course, solely upon the information given the learned judges by the testimony of witnesses, set out in the record.

In Weare *v.* People, 209 Ill., 528, is a recent, full and able discussion of statutes against "bucket shops," sustaining Soby *v.* People, 134 Ill., 66. Indeed, the word "bucket-shop," as well as the business it transacts, is mentioned and denounced in many statutes and decisions, and both the name and the business have become matters of general knowledge. In Booth *v.* Illinois, 184 U. S., 425, it was held that the Illinois statute making all "dealings in futures" gambling contracts and punishable, was within the police power of the State and not prohibited by the fourteenth amendment—affirming *s. c.*, 186 Ill., 43.

In Irwin *v.* Williar, 110 U. S., 499, the court said: "If under guise of the contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void." Wagner *v.* Hildebrand, 187 Pa. St., 136; Jamieson *v.* Wallace, 167 Ill., 388; Wheeler *v.* Stock Exchange, 72 N. H., 315; Clews *v.* Jamieson, 182 U. S., 461; Pickering *v.* Cease, 79 Ill., 328: Bibb *v.* Allen, 149 U. S., 481; 1 Cook on Stock and Stockholders, 3rd ed., sec. 341.

Freund on Police Power (1904), p. 186, says: "It is well established that if there is no intention to buy or sell, but only to pay or receive differences in value, the transaction is simply betting on the rise or fall of market prices, and hence illegal and void."

While the facts found bring the defendant within the words of the statute, it is contended that the addition of the seventh and last section made the whole act unconstitutional and void under the fourteenth amendment to the Constitution of the United States, which guarantees the equal protection of the laws. Said section 7 reads: "This act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business." This section is stated by counsel, and we believe was admitted on the argument, to have been added upon the passage of the bill in the second house. It was doubtless hastily drawn, for it is clearly not germane to the statute which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a "bucket shop," *i. e.*, dealing in the sale of futures, where "it is not intended by the parties thereto that the articles agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them" that merely the difference between the contract

price and the market price of the article at the time specified
20 shall be paid. Such condemned business has no connection with, and the constitutionality of the prohibitive act is in no wise affected by, the provision in section 7, that when any person, firm or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell "the necessary commodities required in the ordinary course of their business," it shall not be deemed a violation "of this act"—the act forbidding the business of carrying on a "bucket shop."

The defendant, however, contends that the purpose of section 7 is to provide that where any manufactory or wholesale merchandising house shall contract to deliver goods at a future date, such establishment may protect itself or "hedge" (as it is called) by purchasing a "future" contract for raw commodities, without intending to demand actual delivery of those identical goods, but, by the profit thereby made, to recoup the loss by the rise in price of the same commodity subsequently bought, perhaps for actual delivery nearer home, to save freight. It is enough to say that no such intent is expressed in section 7, and we must construe it as it is written.

But a purchase for actual future delivery of necessary commodities required in the ordinary course of business and not for "wagering" or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale merchantile establishments as authorized to make *bona fide* dealings in "futures," this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the "ordinary course of such business," when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on "margin," is not an implied restriction upon others to do an act not forbidden by any statute.

Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

The defendant further contends that by section 5, chapter 538, Laws 1905, proof that nothing was actually delivered at the date of the contract and that a "margin" was put up, shall be *prima facie* evidence that the contract is a "wagering" one and forbidden by chapter 221, Laws 1889, and that section 7, chapter 538, Laws 1905, providing that this last act shall not apply to purchases or sales by

manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the 14th amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence, is necessarily a matter left to legislative discretion in the exercise of the police power. There may be good reasons why the purchase of "necessary commodities required in the ordinary course of their business" for future delivery on a "margin," by manufacturers and wholesale merchants, shall not raise a presumption that such dealings are "wagering" contracts, while purchases by them, not of such commodities, or when not "required in the ordinary course of their business," or the purchase by others of any commodities, when made on the deposit of a "margin" and for "future" delivery, shall raise the presumpton of a "wagering" contract.

21 Whether the reason is good and sound for making the purchase of commodities upon "margin" *prima facia* evidence of a "wagering" contract, under a certain state of facts, and providing that upon a different state of facts such purchase upon "margin" does not constitute *prima facie* evidence of a "wagering" contract, is a matter for the legislature. The courts have no veto power upon such exercise of the police power. State *v.* Barrett, at this term.

But aside from what we have already said, the defendant is indicted for carrying on a "bucket shop" business. The legislature had unquestioned power to make such business indictable. Booth *v.* Ill., 184 Ill., 425, and other cases cited, *supra*. The facts found are that the defendant was carrying on the forbidden business. It can in no wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon "margin," shall under certain circumstances raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence, as to certain purchases, upon "margin" were null, because not applying to all purchases upon "margin," this would in no wise invalidate that part of the statute which forbids carrying on the business of running a "bucket shop." The defendant is not indicted for buying commodities for future delivery upon a "margin;" nor are manufacturers and wholesale merchants, nor any one else, exempted from the prohibition of carrying on the "bucket shop" business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

22 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Wake county:—upon consideration

whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark, chief justice, be certified to the said superior court, to the intent that proceedings be had therein in said cause according to law. And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of twenty eight 80/100 dollars ($28.80), and execution issue therefor.

23 Supreme Court of North Carolina.

I, Thos. S. Kenan, clerk of the supreme court of North Carolina do hereby certify that the foregoing is a full and true copy of the record in the case of The State of North Carolina against Ernest Gatewood and also of that of State *v.* E. C. McGinnis, as appears on file in this court. Given under my hand and seal of said court at office in Raleigh on this 23rd. day of August, 1905.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court.

Endorsed on cover: File No. 19,888. North Carolina supreme court. Term No. 386. Ernest Gatewood, plaintiff in error, *vs.* The State of North Carolina. Filed August 26, 1905. File No. 19,888.

Office Supreme Court U. S.
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OCT 23 1905
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Clerk.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 105

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

MOTION TO ADVANCE.

Plintiff in error, Earnest Gatewood, moves the court to advance this case, and assigns the following reasons for this application, to-wit:

STATEMENT OF MATTER INVOLVED.

He is under indictment and conviction for violating Chapter 538, Laws 1905, of the State of North Carolina, to-wit: For opening and operating an office at Roxboro, North Carolina, for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver agricultural products, stocks, etc., for future delivery, and also for receiving an order to purchase on margin one hundred bales of cotton for future delivery, and for receiving a deposit of $50.00 by way of margin to cover fluctuations in the price of said cotton. He is under same indictment and conviction for posting and publishing information over his wires of the fluctuations in prices of grain, provisions and bonds. A special verdict was found by the jury. A fine was entered by the trial court against the plaintiff in error, and the judgment of the trial court was affirmed on appeal to the Supreme Court of North Carolina.

REASONS FOR APPLICATION.

1. This is a criminal action, and plaintiff in error is under sentence to pay a fine for violating an act of the General Assembly of North Carolina.

2. Plaintiff in error contends that the said act of the Legislature of North Carolina is not in harmony with the Constitution of the United States, and that it violates Section 1 of the 14th Amendment of the Constitution of the United States, the guarantee of equal protection of the laws.

3. The opinion of the Supreme Court of North Carolina in this case, upholding the constitutionality of Chapter 538, Laws 1905, has closed out and broken up the business of plaintiff in error in Durham, N. C., and of many other brokers and stock dealers in the towns and cities of North Carolina. This matter is, therefore, one of State interest and importance, affecting at least a score of financial institutions.

Wherefore, plaintiff in error prays the court that his cause may be advanced, and that as early an argument of the same may be had as is convenient to this court. And as in duty bound he will ever pray.

October 9th, 1905.

ROBERT W. WINSTON,
VICTOR S. BRYANT,
Attorneys for Plaintiff in Error.